Supreme Court of the United States

October Term, 1946.

No. 405.

MARVIN GAYES,

Petitioner,

vs.

THE STATE OF NEW YORK.

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK.

RESPONDENTS' BRIEF.

DANIEL J. O'MARA,
District Attorney,
Monroe County,
Court House,
Rochester 2, N. Y.

HARRY L. ROSENTHAL,
Assistant District Attorney,
Of Counsel.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Argument	6
In Conclusion	21
The Judgment Should Be Affirmed	22
Appendix	23

Cases Cited.

Betts v. Brad[illegible]S. 455 18
Comm[illegible]ris, 351 Pa. 325, 329 7
John[illegible]4 U. S. 458 ..... 13, 17, 19
M[illegible] Supreme Court, (1948) 295 N. Y. 92. 7
M[illegible] v. Goldstein, (1943) 290 N. Y. 19 7
P[illegible] Frank Canizio, 327 U. S. 82 13
People v. Gersewitz, 294 N. Y. 163, 167 ..... 2, 7
People *ex rel.* Kennedy v. Hunt, 257 A. D. 1039 8
Sanders v. The State, 85 Indiana, 318 7

Statutes Cited.

N. Y. Const. Art. 1, Sec. 6 ..... 9, 19, 22, 23
N. Y. Code of Criminal Procedure, Sec. 308 .. 9, 10, 14, 22, 23
N. Y. Code of Criminal Procedure, Sec. 480 23

II.

PAGE

N. Y. Code of Criminal Procedure, Sec. 481 24
N. Y. Code of Criminal Procedure, Sec. 482 ..... 13, 24
N. Y. Code of Criminal Procedure, Sec. 485-a 24
N. Y. Code of Criminal Procedure, Sec. 517 25
N. Y. Code of Criminal Procedure, Sec. 520, subdivisions 2, 3 25
N. Y. Code of Criminal Procedure, Sec. 931 26
N. Y. Judiciary Law, Sec. 297 26
U. S. Const. Fourteenth Amendment, Sec. 1 23

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Opinion Below.

The petitioner proceeded by motion, *coram nobis,* in the County Court, Monroe County, New York, for an order vacating and setting aside a judgment of conviction rendered against him, dated July 28, 1938. The application and motion of the petitioner was predicated upon the contention that at the time of the petitioner's arraignment on July 15, 1938, when his plea of "guilty" was entered, he "was not informed of his Constitutional rights of assistance of counsel (fol. 33)," and, further, it was the claim of the petitioner that "the record is silent as to whether the petitioner was informed by the Court that he was entitled to the assistance of counsel, or that he was informed of the statutory provision set forth in the Code of Criminal Procedure, N. Y. S., Sections 8, subdivision 2; 188 and 308, and that his

rights are protected under Article I, Section 6, N. Y. S. Constitution (fol. 34)." The motion was further predicated upon the petitioner's claim that he had not intelligently and competently waived his rights or intelligently and competently understood his rights to assistance of counsel (fols. 33-37).

The motion was denied by an order made June 14, 1946 (O'Connor, C. J.) unaccompanied by any opinion (fol. 44).

Jurisdiction.

The order of June 14, 1946, denying petitioner's motion to vacate and set aside the judgment of conviction, dated July 28, 1938, was not appealed from. The Court of Appeals of the State of New York has held that such an order is not appealable (*People vs. Gersewitz*, 294 N. Y. 163). The jurisdiction of this Court is, therefore, sought to be invoked on the ground that the order of the Monroe County Court, being under New York practice not appealable, constitutes the Monroe County Court the highest Court of New York State in a *coram nobis* proceeding in which a decision could be had for the purposes of this application. The respondent intends to demonstrate in this brief that jurisdiction does not exist as contended by the petitioner because (1) on all of the facts, no question of due process of law is presented to this Court, and (2) the petitioner has failed to exhaust his remedies in the State Courts, and for this reason has not proceeded to the highest Court in which a decision could be had relative to the conviction herein being attacked by the petitioner.

Questions Presented.

The petitioner raises the following questions (petitioner's brief, page 2):

1. Whether a claim of right under the Fourteenth Amendment to the Constitution of the United States was necessarily determined and denied by the order of the County Court.

2. Whether upon the facts alleged and upon those conceded the petitioner was entitled by the Fourteenth Amendment to the Constitution of the United States to have counsel assigned for his assistance before his plea of guilty was accepted by the Court.

3. Whether upon the facts alleged and upon those conceded the petitioner's right to an assignment of counsel was intelligently and competently waived.

Constitutional and Statutory Provisions Involved.

The relevant provisions of the Constitution of the United States and of the Constitution and statutes of the State of New York are set forth in the Appendix, *infra*, pp. 23-26.

Statement.

On July 13, 1938, the petitioner was indicted, together with one Francis Smith, for the crimes of Burglary, Third Degree and Petit Larceny. The indictment charged that the two defendants, acting in concert, on or about June 11, 1938, at the Town of Rush, in the County of Monroe, New York, feloniously broke and entered the building and garage of one Francis Marlow, doing business under the name and style of Pontiac Garage, with intent to commit therein the crime of larceny (fol. 1).

It appears, not only from the Record of Conviction, but from the minutes of the stenographer present in Court, that the petitioner, Marvin Gayes, was brought into Court for arraignment on or about the 15th day of July, 1938 (fol. 3)

over a month after the commission of the alleged crime, and it appears from the stenographer's minutes that the indictment was read by one Clarence J. Henry, Esq., one of the Assistant District Attorneys of the County of Monroe, to the defendant, and in plain terms stated to the defendant that he was accused of the crime of Burglary in the Third Degree in that he was charged with having broken and entered the building and garage of Francis Marlow with the intent to commit the crime of larceny therein, and was notified, further, that there was a second count in the indictment which accused this petitioner of the crime of Petit Larceny, in that he stole certain articles of currency from the premises at that time. It then appears that the Assistant District Attorney, Mr. Henry, after reading the substance of the indictment to the petitioner, stated to him, "Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment?" It then appears that the petitioner, Gayes, answered, "No, sir." The petitioner was then asked, "What is your plea?" to which the petitioner answered, "Guilty." Then the petitioner was asked whether he had received any promise from the District Attorney or any member of his staff as to what disposition would be made of his matter, to which the petitioner answered, "No, sir."

It then appears that the sentence was postponed to July 25, 1938, at which time the Court further adjourned sentence to July 28, 1938. On July 28, 1938, the defendant was asked whether he had any legal cause to show why the judgment of the Court should not then be imposed upon him, and the petitioner answered in the negative, whereupon the Court sentenced the petitioner to be committed to the New York State Vocational School at West Coxsackie, New York.

It must be borne in mind that the time between the entry of the plea of guilty and the time of sentence is a period

during which Court investigation is carried on by the Probation Office attached to the County Court, so that the Court may properly be apprised of the background and history of the defendant. It is important to note that in the statement of the defendant attached to this record, on page 4 of the transcript, that the petitioner had stated that his residence was the S. P. C. C., or Society for the Prevention of Cruelty to Children, located at Rush, New York; that he was sixteen years of age on September 18, 1937, and that he had received two years of High School education; that he had a previous Court record dating back to January 14, 1938, which was to the effect that he had been convicted at Toronto, Canada, of the crime of Burglary in the Third Degree and that he had been given a six months' sentence, and reference was made to being deported. A reference appears in the statement made by the defendant that he had waived his right to an attorney.

Petitioner, in his moving papers before Judge O'Connor, alleges that at the time of his arraignment and plea that he was sixteen years of age, and could not have understood his rights to counsel, and that when asked if he "desired counsel, and answered "No" thought that he would be forced to pay the lawyer in the event of conviction or acquittal, and that having no funds or relatives, who could come immediately to his assistance, he plead guilty to the indictment.

It appears further from the transcript of the record before this Court that Gayes, subsequent to being released from the New York State Vocational Institution at West Coxsackie, was charged in the County of Schenectady, New York, on October 15, 1941 (fol. 40), with having, with two others, committed the crime of Burglary in the Third Degree, in that he, together with two others, broke and en-

tered a building known as Scottie's Radio Service, with intent to commit therein the crime of larceny. The record discloses that Gayes was *duly* arraigned and was thereafter convicted upon a plea of guilty and sentenced as a previous felony offender to a term of ten to twenty years in Clinton Prison at Dannemora, New York. The respondents urge that with respect to the date of arraignment and plea, as well as the date of sentence, a strong presumption or regularity exists and that the Trial Court performed its duty in the premises and that the petitioner was sufficiently advised of such rights as he was entitled to enjoy in this regard.

Argument.

I

It is the contention of the respondents that a Criminal Court is empowered to set aside one of its own judgments in *coram nobis* proceedings *only* where the judgment was procured by fraud or in violation of a Constitutional right and under circumstances making it impossible for the defendant to avail himself of the ordinary remedies which are afforded him by the provisions of the Code of Criminal Procedure and the Constitutions of the State of New York and United States. It is respondents' contention, further, that where a Writ of Error *Coram Nobis* is sued out, not only must it be alleged, but it must be proved that the judgment was obtained through fraud, misrepresentation or any violation of the defendant's Constitutional rights and that, further, it must be alleged and proved that it was through no fault of the defendant that his alleged grievances were not presented to the Trial or Appellate Courts through a means regularly provided by the Code of Criminal Procedure. The New York Courts, as well as the Courts of the

United States have recognized the power of Criminal Courts of original jurisdiction to entertain a motion in the nature of a Writ of Error *Coram Nobis* only upon a showing that the petitioner was the victim either of fraud, misrepresentation, or of a violation of his Constitutional rights, and it has been indicated that the power of the Courts to entertain such motions can have no broader scope.

(*People vs. Gersewitz*, (1945) 294 N. Y. 163, 167;
Matter of Hogan vs. Supreme Court, (1946) 295 N. Y. 92;
Matter of Lyons vs. Goldstein, (1943) 290 N. Y. 19).

In the case of *People vs. Gersewitz, supra*, Judge Lehman stated:

> "We have sanctioned the exercise of such a power by a Court to * * * set aside an order or judgment which was induced by fraud or procured in violation of a Constitutional right of a party. Perhaps that power can have no broader scope."

Upon a consideration of the authorities, it would seem to be the law that in order for a defendant to come properly before the Court, he must show that his petition for a Writ of Error *Coram Nobis* must be founded on some fact which was unknown to the petitioner at the time of his conviction and which the exercise of reasonable dilligence would not then have disclosed, or which the petitioner was then, in some way, prevented from bringing to the attention of the Court.

(*Sanders vs. The State*, 85 Indiana, 318).

In the recent case of *Commonwealth vs. Harris*, 351 Pa. 325, 329, the Court stated:

> "Where a party seeks to avail himself of the remedy of a Writ of Error *Coram Nobis*, he must show that *it was by no fault or negligence of his* that the error in fact assigned was not made to appear at the *former trial*." (Italics our own.)

In line with that case, there is in the State of New York the decision of the Fourth Department of the Appellate Division of the Supreme Court (*People ex rel. Kennedy vs. Hunt*, 257 A. D. 1039) a statement to the effect that where the defendant has entered a plea of guilty at a time when he is not represented by counsel that the defect, if there be one, would be cured when the prisoner, represented by counsel, failed to raise the question when the sentence complained of was imposed upon him. The Court in that case very definitely indicates that the policy of a defendant in permitting a matter to go to judgment without raising the question of any possible violation of his rights, will not be allowed, so that on a future occasion, at the time and election of the prisoner, he may then choose to raise the question that he was not properly advised. It necessarily follows that if that were permitted, defendants sentenced to long terms of imprisonments, would wait for a substantial period of time to transpire and then, at their election, come forward with an ingenious statement without any other backing except the *defendant's statement alone* to the effect that he did not know of his rights and that his matter should be brought before the Court and his plea set aside and that he should be placed in status quo, knowing full well at that time that witnesses might not be available to try the particular case. He would also know full well that their memories would not be as certain on the subsequent date of trial; that naturally the testimony of a witness would be open to cross-examination and attack upon matters which, when fresh in memory, could easily be stated, but which, on subsequent dates, naturally would not be apparent long after the date of the occurrence of the transaction upon which the action is predicated.

It would seem from a reading of the authorities stated by the petitioner in the instant case, as well as the informa-

tion set forth in his moving papers, that the petitioner has had the benefit and advice of persons in prison with him who have made a very serious study of the decisions of the Courts and that the statements appearing in petitioner's papers, when analyzed, together with the statement of the Court, would seem to indicate that the petitioner and his advisers, prior to initiating the proceeding herein in Monroe County Court, had made an exhaustive study with the thought of placing the petitioner, if possible, in a position where his case would be synonymous with the decisions referred to. Not for one moment is it the intention of the respondent to say that because of that situation any possible violation of the defendant's rights is justified. Nevertheless, from the petitions which have been filed recently, a situation has been presented which the respondents believe should be called to the Court's attention, with the thought that these applications will receive a great deal of analysis in determining the justification and sincerity of the petitions presented.

It definitely is indicated by the discussion of counsel, as well as the matters set forth in the moving papers, that there is no intimation of any fraud or misrepresentation having been employed upon this petitioner; further, it must be shown in order to properly exercise the right to relief under a Writ of Error *Coram Nobis* that there was a violation of the Constitutional rights of the defendant within the meaning of the Fourteenth Amendment to the Constitution of the United States or the provisions of the Constitution of the State of New York, Article 1, Section 6, and the provisions of Section 308 of the Code of Criminal Procedure of the State of New York, which relate specifically to the proceedings which take place at the time of the arraignment of a defendant upon an indictment.

We have properly evaluated the situation, we submit, as regards any possible right to relief, predicated upon any question of fraud or misrepresentation, and it is the purpose of the respondents, further, to indicate to this Court the attitude that the respondents assume in regard to the remaining problems presented and which were considered by the Monroe County Court at the time that the Writ of Error *Coram Nobis* was before the Court.

II

Section 308 of the Code of Criminal Procedure provides that if the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does, the Court must assign counsel. In the instant case, Gayes did appear before the County Court on his arraignment on the 15th day of July, 1938 without counsel. The Assistant District Attorney, in the presence of the Court, after notifying the petitioner of the contents of the indictment, the specific charge against him, *in what we contend was understandable language to a youth of sixteen*, asked the petitioner if he needed a lawyer before entering a plea of guilty or not guilty to the indictment.

These words, we submit, which were used, indicated to the defendant that if he needed a lawyer, he could only assume that he was entitled to one, if he expressed the desire to have one. Further, these very facts, circumstances and words all add up to the proposition that in the light of the entire picture, this defendant, upon being asked whether he needed a lawyer before entering his plea, could very well assume that if he did express a need, that a lawyer would be furnished for him. Here it appears that when the petitioner was asked if he needed a lawyer, he made no statement to the effect that he didn't have funds

to hire a lawyer. He said nothing to the effect that he had no friends or relatives to whom he might turn. He did not ask if he might get in touch with any possible friends or relatives. He did not indicate that he was without funds to get a lawyer, although it might very well be assumed from the fact that, as it appears, he was living in a place provided for him by the Society for Prevention of Cruelty to Children (fol. 4), he was not possessed of funds, in all fairness to this petitioner.

Nevertheless, the real question which arose at the time was whether he actually felt the need of an attorney to advise him as to whether he should plead guilty or not guilty to the indictment. Is it not fair to assume from the facts and circumstances as they appeared on that occasion of his plea, that if had the requisite money to hire a lawyer, or to at least try to hire one, that he felt at the time, from his statement, that he did not need a lawyer? If he had no need, certainly, even though possessed of funds, he would not have hired one, if within his pecuniary power to do so, feeling and believing at the time that he did not need a lawyer for the purpose of pleading guilty or not guilty to the indictment in question.

The Laws of the State of New York, as they existed in 1938, at the time of the commission of the crime with which Gayes was charged, and at the time of his arraignment and conviction, did not provide for treatment of a sixteen year old person as a Youthful Offender as it does today. I very completely sympathize with the view point taken by Mr. Wechsler in his argument to this Court as concerns what would probably have happened today in reference to the treatment of Gayes. However, even today, as in 1938, a very serious amount of consideration would have been given to the fact that Gayes had been

previously convicted of an act of Burglary, Third Degree, approximately six months prior to the conviction here contested. The benefits of the "Youthful Offender Law" are intended primarily for first offenders and not for recidivists.

It must be borne in mind that in the January just prior to this conviction of July 28, 1938, this defendant was convicted of an offense, which he stated at the time of his plea of guilty, was an equivalent charge, one with which he had had some previous experience. Your respondents cannot agree with the petitioner's argument that the words, "breaking and entering" have such an unusual and technical meaning as has been suggested. The petitioner did not in any way indicate at the time of his arraignment, with his background of experience with a similar charge having been proven against him, that he was in doubt as to what was meant by the phraseology used in the statement of the charge upon which he was arraigned. It must be borne in mind that this young man, with a second year in High School education, would have within the limits of his vocabulary the use of any of the phraseology mentioned in the indictment and an understanding of the implication of the various words and phrases therein used. True, it is, that some of these words may be technically used and construed, but, there is nothing in the actions of the petitioner at the time of his arraignment which indicated that there was in his mind any question as to just what the words "breaking and entering with intent to commit the crime of larceny" meant. It would be assumed that these words had their ordinary and usual meaning to him and were so understood, and it is submitted that if that is the fact, then the defendant definitely understood the nature of the charge against him and was

in a position then to know whether he actually needed the advice of a lawyer or not.

Furthermore, it appears from the record before this Court that sentence was not imposed upon this petitioner at the time of his arraignment and plea. If anything, the facts indicate that it was a period of at least some thirteen days afterwards that sentence was imposed. It must be assumed from those facts that the Court, in compliance with the provisions of Section 482 of the Code of Criminal Procedure, had, in the interim, caused an investigation of the petitioner's background to be made, which would naturally take into consideration a measurement of the petitioner's mental abilities, what his education had been, what his background had been, what his knowledge and understanding of things would be, and an investigation certainly, of the facts surrounding the petitioner's participation in the crime to which he had plead guilty. The Court, naturally, must have had before him the facts indicating that this petitioner knew what he was doing when he plead guilty, for, it is submitted, that the Court, in the performance of his duty, which he is presumed to have been doing regularly, would otherwise have seen fit to indicate that the petitioner's plea of guilty should have been set aside on the ground that he did not know, first of all, what his rights were because of lack of understanding and immaturity; furthermore, that if the investigation indicated that the petitioner was not guilty of the charge, the Court, on that ground, would have set aside the plea of guilty and obligated the prosecution to proceed with the trial of the petitioner.

From the decision of this Court in *Johnson vs. Zerbst*, 304 U. S. 458, as well as *The People of the State of New York vs. Frank Canizio*, 327 U. S. 82, it is assumed that

the Court, in the instant case, will decide this case upon the peculiar facts of the instant case. It is, therefore, the respondents' belief, predicated upon the facts of this particular case, that the Court at the time of accepting the plea of guilty, and also at the time of pronouncing sentence upon the petitioner, had sufficiently advised this petitioner in accordance with the provisions of law.

While *we agree* that the exact language of Section 308 was not used at the time of the arraignment of this petitioner, nevertheless, he, at that time, had the right to determine whether or not he wanted an attorney to advise with him. There is no law of the State or of this land which forces a defendant to have counsel if he does not want counsel. He has a right to determine whether he shall be represented by counsel or not. He may, under the Laws of this State and land, proceed to trial without having a lawyer and defend in person. When this petitioner stated that he did not feel that he needed a lawyer before entering his plea, he was exercising his Constitutional right to defend in person. The fact that he was entering his plea of his own free will and choice is fortified by the statement that the defendant had made that he had not received any promises from the District Attorney or any member of his staff as to what disposition would be made of his case. This fact strengthens the argument that the petitioner was entering his plea unequivocally with no thought that he was other than guilty of the charge which had been read to him and which he indicated at the time was understood by him, and that he, therefore, wished to throw himself on the mercy of the Court who, after a very appreciable time, sentenced him, not to a State's prison, but to a Correctional Institution, where he would receive training and be rehabilitated so that he could

become a contributing member of society, rather than continue his manners and ways of anti-social being.

That he was not kept at the Correctional Institution for any extended period of time appears quite definitely from the record that the defendant was sent to Clinton Prison from Schenectady County on the 15th day of October, 1941, so that it must be presumed that he had been released from confinement in the Correctional Institution of New York State at West Coxsackie, N. Y. prior to that particular time.

III

In 1941, at the time this defendant-petitioner was before the County Court in Schenectady County upon a similar charge of Burglary in the Third Degree, it appears from the record of conviction (fol. 41) that the defendant at that time of being sentenced as a previous felony offender, based upon his previous conviction in Monroe County, was asked whether he had any legal cause to show why judgment should not then be pronounced against him, and it does not appear in any of the papers advanced by the petitioner that he at that time, three years after his previous conviction raised any question, even though it may be assumed that he then could have raised any question as to the legality of his conviction in Monroe County in July of 1938. This is proven by the fact that the statement appears in the Record of Conviction that no legal cause and no sufficient cause was alleged or appeared to the Court before the judgment sentencing Marvin Gayes to confinement in Clinton Prison was imposed. It is a fact, however, that Gayes, at that time, could have raised the question of any possible attack he wished to make upon the previous conviction.

He could have taken his matter to the Supreme Court of the State of New York, to the Appellate Division of that Court, and with consent, if denied relief to which he felt he was justly entitled, could have taken his matter to the Court of Appeals of the State of New York. There is no showing here that any such endeavors were made, and it must be assumed that the petitioner at that time, with whatever facilities were afforded him, did not see fit to make the statement that he now makes—that he did not understand his right to counsel as guaranteed to him under the Laws of the State of New York.

While it is true that what happened in 1941 in Schenectady County does not defend what happened in Monroe County in 1938, nevertheless, it would seem that if the petitioner felt that his rights had been abridged in 1938, that he would, with the experience that he necessarily had gone through during the three years which elapsed between the time of his conviction in Monroe County and his conviction in Schenectady County, have learned sufficiently through the experiences which prisoners in Correctional and Penal Institutions have, the requisite information so that in 1941, either through counsel, or otherwise, he would have objected to his being punished as a second felony offender.

It is of great importance in considering this matter for this Court to examine the letter addressed to Judge O'Connor at folio 18. It must be borne in mind that since 1941 this petitioner has been in prison continuously, it would appear, at Dannemora. The information and the make-up of the communication does not represent the intellectual attainment of a person ordinarily deprived of an education or understanding. As a matter of fact, the communication indicates quite the contrary, that the petitioner, Marvin Gayes, at the time of writing the letter in question, dated May 19, 1946, either had the advice of some one versed in

law, or had possessed himself of a high degree of knowledge concerning legal matters. The Court will note, I assume, the particular reference to the fact that no one of the age of seventeen years could competently (fols. 20-21) and intelligently waive any Constitutional right, as appears in that letter of May 19, 1946, and the petition filed May 16, 1946, referring to the inability of a sixteen year old to understand the right to counsel (fol. 34).

IV.

The contention that the Fourteenth Amendment to the Constitution of the United States was violated, in that counsel was not assigned to this defendant, is not a valid argument under the facts of this particular case. As has been said before, as stated in Johnson vs. Zerbst, *supra,*

> "The determination as to whether there has been an intelligent waiver to the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

As has been previously stated, the petitioner was advised of the nature of the charge against him. He was asked if he needed counsel before entering his plea of guilty or not guilty, to which he unequivocally answered, "No". It is your respondents' contention that these circumstances demonstrate definitely that the defendant was substantially apprised of his right to counsel when he was asked if he needed counsel. Upon his unequivocal answer that he did not need counsel, taking into consideration his background of having been previously convicted, the fact, as appears from the Minutes of the Clerk taken at the time of his conviction that he was given a sentence of six months, and a further notation and reference to deportation from Toronto, Canada, those circumstances indicate that this petitioner at the time was a young man who was possessed of a degree of sophistication beyond that of the ordinary

young man to be found in his particular lot and, furthermore, that he was possessed of an educational background together with that experience which certainly indicated that he had the ability to take care of his own interests at the time of the consideration of the narrow issue of his guilt or innocence of the charge against him. As was stated in the case of *Betts vs. Brady*, 316 U. S. 455, 472, he was not wholly unfamiliar with criminal procedure. If he had asked for counsel and been denied counsel, it stands to reason that his conviction would have been readily reversed. However, in this case, we have at the present time only the petitioner's own statement that he did not understand the right to counsel, as it was explained to him at the time of his arraignment. It must be borne in mind that at no time during the several years which followed his conviction in 1938 until 1946 when the motion was made to Monroe County Court to vacate his judgment of conviction did the petitioner in any way evidence that he was ignorant of his right to counsel or without funds or without friends or family. It does not appear that when he was before the Court in Schenectady at the time of his being sentenced on the Burglary charge there, which sentence he is presently serving, that he in any way indicated any of the facts now related. If he enjoyed counsel at the time of his conviction in 1941 in Schenectady, there is no indication that his counsel, if any, or the petitioner at any time, raised any question indicating any of the items of his present claim in reference to his conviction which took place in 1938 in Monroe County Court. It is your respondents' opinion that the petitioner *waived* his right to counsel on the day of his arraignment in the Monroe County Court. Whether or not a person is possessed of the requisite intellectual ability to make the determination and enter the plea which the petitioner did, was a question of fact which presented itself to the Court at the time of the petitioner's plea. The fact that such plea

was accepted by the Judge presiding in the Monroe County Court at the time of the petitioner's plea, by the presumption of regularity, indicated that the Judge in the performance of his duties believed, from all of the facts and circumstances, that the petitioner had the requisite ability to understand that when he was asked if he needed counsel, that it impliedly indicated that he was entitled to have counsel. Otherwise, there would have been no reason for asking him if he needed counsel. That the defendant answered in the negative met the test set forth in the Johnson vs. Zerbst case, *supra*, which said that an intelligent waiver of the right to counsel must depend in each case upon the particular facts and circumstances surrounding that case, including the *background*, the *experience* and conduct of the accused.

The petitioner has taken a line of reasoning which practically amounts to an assertion that a sixteen or seventeen year old person, even though apprised of his right to counsel by the Court, or that he is entitled to the aid of counsel, cannot waive that right, and indicates that there is an immaturity of judgment attached to sixteen and seventeen year olds which would vitiate any plea entered by such a person unless accompanied by counsel, advising him at the time.

In view of the fact that through the years there have been a great many convictions prior to the enactment of the so-called "Youthful Offender Law" in the State of New York, that question may be asserted almost endlessly. It, therefore, occupies a position of great importance, your respondents sincerely believe. The Constitution of the State of New York provides, Article 1, Section 6, that the party accused shall be allowed to appear and *defend in person*, and with counsel, as in civil actions. In New York State, a person over the age of sixteen years is subject to prosecu-

tion upon a charge of crime. If we are to take the position asserted by the petitioner, it would seem to be counter to the statement which appears in the Constitution of the State of New York which permits persons charged with felony which is one of the divisions of crime, to appear and defend in person. We submit that the position asserted by the petitioner would then be and is in effect a request for a determination which would be contra to the provisions of the Fourteenth Amendment, in that there would be a deprivation of life or liberty without due process of law. Under the law as it stands today in New York State, under the Constitution of the State and the statutes enacted pursuant thereto, a defendant sixteen or seventeen years old may defend in person. It may well be that this provision of the Constitution should be amended to require Courts to assign counsel to all defendants unable to pay for legal services where the defendants are of immature age. As a matter of fact, and I hope it is proper to make the statement at this time, the District Attorney of the County of Monroe, has taken the position that in every case where a defendant is between the age of sixteen and twenty-one years of age, no plea of guilty will be taken from a defendant without the defendant's having first had the benefit of counsel. That is the present method which is pursued in this particular county with reference to youths between the ages of sixteen and twenty-one. An interesting situation might develop where some defendant at some time or other may choose to say that he will not provide himself with counsel, whether financially able to do so or through the Court's assigning counsel to him. It may be that a defendant may choose to go to trial and say, "I am going to defend in person." If we are to accept the theory advanced by the petitioner that no person sixteen or seventeen years of age is intellectually capable of waiving counsel or understanding, even when apprised of his rights, just exactly what those rights

are, then may it not be foreseen that at some future time, if such interpretation were to be adopted, that in an instance hypothetically referred to as above, a person sixteen or seventeen who refuses counsel and who goes to trial, may still be heard to say, in the event of his conviction, that he did not intelligently and competently waive his right to counsel, even though the act of refusal of counsel were one of his own.

As regards the stipulation regarding the minutes of the stenographer, which are made part of the record before this Court, your respondents would like to call this Court's attention to the fact that at the time this matter was originally submitted to Judge O'Connor, it was not known that these minutes were in existence. The stenographer who had ordinarily taken the Court's minutes before Judge William C. Kohlmetz, who presided in the Monroe County Court at the time of the petitioner's arraignment on July 15, 1938, had died, and it was assumed that because of that fact, and as well as the fact that the Minutes of the Court are not required to be kept after two years, that the Minutes could not be had and were not available. When the fact became known to your respondents that they were in existence, your respondents immediately notified counsel assigned by this Court to the petitioner and entered into a stipulation so that the actual Minutes of the Arraignment of this petitioner could be made available for this Court's consideration.

In Conclusion.

We respectfully submit:

1. That no federal question is raised by the contentions of the petitioner in the case presented to this Court, and that it is our thought that the petitioner was granted due process of law in conformity with the provisions of the

Fourteenth Amendment, in that the provisions of the New York State Constitution, Article 1, Section 6, were met by the petitioner's being advised of the nature and cause of the accusations against him, and being asked as to whether he needed the aid of counsel, thereby complying with the provisions of Section 308, which specify that upon arraignment without counsel, he must be asked if he desire the aid of counsel, did reply in the negative, thereby obviating any requirement that the Court assign counsel to him.

2. That it does not appear that the petitioner exhausted his remedies in New York State, and that upon the sentence which he is now serving there was no appeal taken from it to the highest Court of the State in which a decision could be had.

3. That the presumption of regularity in the proceedings at the time of the plea of guilty and conviction in the Monroe County Court has not been overcome.

4. That the petitioner, though sixteen years of age at the time, did intelligently and competently waive his right to counsel.

V

FOR THE FOREGOING REASONS, WE RESPECTFULLY SUBMIT THAT THE JUDGMENT OF THE COUNTY COURT OF MONROE COUNTY SHOULD BE AFFIRMED AND THE PROCEEDINGS HEREIN DISMISSED.

DANIEL J. O'MARA,
District Attorney,
Monroe County.

HARRY L. ROSENTHAL,
Assistant District Attorney,
Of Counsel.

Appendix.

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of New York, Article One, Section 6:

> No person shall be held to answer for a capital or otherwise infamous crime * * * unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No persons shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself * * *

No person shall be deprived of life, liberty or property without due process of law.

New York Code of Criminal Procedure

> Sec. 308. *Defendant appearing for arraignment without counsel to be informed of his right to counsel.* If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. * * *
>
> Sec. 480. *Arraignment of defendant for judgment.* When the defendant appears for judgment, he must be asked by the clerk whether he have any legal cause to show, why judgment should not be pronounced against him.

Sec. 481. *What cause may be shown against the judgment.*

He may show for cause, against the judgment,

1. That he is insane; and if, in the opinion of the court, there be reasonable ground for believing him to be insane, the question of his insanity must be tried as provided by this Code. If, upon the trial of that question, it is found that he is sane, judgment must be pronounced; but if found insane, he must be committed to the state lunatic asylum until he becomes sane; and when notice is given of that fact, he must be brought before the court for judgment;

2. That he has good cause to offer, either in arrest of judgment, or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.

Sec. 482. *If no sufficient cause shown, judgment to be pronounced.*

If no sufficient cause appear to the court why judgment should not be pronounced, it must thereupon be rendered. Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physicial examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

Sec. 485-a. *Examination of convict before sentence.*

It shall be the duty of the court in which any person shall be convicted of an offense punishable in a state prison, before passing the sentence therefor, to ascertain by the examination of such convict on oath, and in addition to such oath, by such other evidence as can be obtained, whether such convict had learned and practiced any mechanical trade, and in like manner such other facts tending to indicate the causes of the criminal character or conduct of such convict, as to the court shall seem proper and desirable, and the court shall direct the clerk of the court to enter such of the facts so ascertained, and such other facts as to the court shall seem proper and desirable, upon the minutes of

the court, and said clerk shall include a copy thereof in the certified copy of the sentence of such convict which shall be delivered to the sheriff of the county in which such conviction shall be had.

Sec. 517. *In what cases appeal may be taken by defendant.*

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals, and upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred and eighty-five, may be reviewed. For every purpose of an appeal herein, a conviction shall be deemed a final judgment, although sentence has been or may hereafter be suspended by the court in which the trial was had, or otherwise suspended or stayed, and the supreme court upon such an appeal may review all decisions of the court upon a motion for a new trial, or in arrest of judgment. A judgment of affirmance upon any such appeal shall not operate to exclude any appellant, otherwise entitled thereto, from the right of suffrage.

Sec. 520. *Appeal, a matter of right; one appeal; how taken.*

1. • • •

2. Elsewhere than in the City of New York, such appeals shall be taken as follows: From a conviction by a court of special sessions, police court, police magistrate, or justice of the peace to the county court of the county in which the conviction was had; from a conviction by a county court or in the supreme court except where the penalty is death, to the appellate division of the supreme court of the department in which the conviction was had; from a conviction by a county court or by the supreme court, where the penalty is death, to the court of appeals.

3. Where an appeal has been taken and has been decided by any of the appellate tribunals hereinabove referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not otherwise. If a judge of the court of appeals or a

justice of the appellate division of the supreme court of the department in which such conviction was had certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a f her appeal on such question of law may be taken to the court of appeals.

4. • • •

Sec. 931. *Investigation.*

Probation officers when directed by the court shall fully investigate and report to the court in writing on the circumstances of the offense, criminal record and social history of a defendant, and in the case of a child in children's court the circumstances responsible for the child's appearance in court and his social history. Whenever desirable and facilities exist therefor, they shall also obtain a physical, mental and psychiatric examination of such defendant or such child and report thereon in like manner to the court prior to sentence or adjudication. Such investigations and reports shall be made promptly. The court shall have such information before it prior to sentence or adjudication. When an offender is committed or sentenced to a correctional institution for adults for a period longer than three months, or when a child is committed or placed in an institution either for delinquent or neglected children, a copy of the probation officer's investigation shall be sent by the court to the warden, superintendent or director of the institution. When an offender is committed or sentenced to a correctional institution under the supervision of the state department of correction, an additional copy of the probation officer's investigation report shall be forwarded to the state commissioner of correction.

New York Judiciary Law.

Sec. 297. *Preservation of original notes for two years when not filed with clerk.*

Uuless the original stenographic notes taken upon a trial or hearing, are filed, pursuant to an order, made as prescribed in section thirteen of this chapter, they must be carefully preserved by the stenographer, for two years after the trial or hearing; at the expiration of which time he may destroy the same. Formerly § 298, renumbered 297 and amended L. 1945, C. 649, § 148, eff. April 9, 1945.

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1946.

Marvin Gayes, Petitioner, v. The State of New York. | On Writ of Certiorari to the County Court of Monroe County, State of New York.

[June 23, 1947.]

Mr. Justice Frankfurter announced the judgment of the Court in an opinion in which The Chief Justice, Mr. Justice Reed and Mr. Justice Jackson join.

This is another case in which release is sought from confinement under a sentence by a State court following a plea of guilty, on a claim of a denial of due process of law through want of benefit of counsel.

The circumstances are these. On July 15, 1938, Gayes, then a lad of sixteen, was arraigned in the County Court of Monroe County, New York, upon an indictment charging burglary in the third degree and petty larceny. According to the record of conviction, he was asked, in accordance with the requirement of § 308 of the New York Code of Criminal Procedure, whether "he desired the aid of counsel," and he answered "No."[1] Imposition of sen-

[1] Subsequent to the proceedings before the County Court of Monroe now under review, the minutes of the original proceedings against Gayes came to light. By stipulation of counsel these minutes are here. According to them, the precise question put to Gayes by the Assistant District Attorney in the presence of the Judge was, "Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment?" To which Gayes replied, "No, sir." It may be inconclusively debated whether if Gayes was asked "if he desired the aid of counsel," as stated in the entry in the record of conviction, he was better informed of his rights, than if he was asked, "Do you need a lawyer?" In view of our disposition, the difference in significance becomes immaterial, and it is also immaterial whether, if there were a difference, we could consider, even in a case involving belated release from State detention, a matter not before the court whose judgment is

tence was postponed to July 28. When on that day Gayes appeared for judgment, he was asked, again according to the requirements of New York law, whether "he had any legal cause to show why judgment should not be pronounced against him." New York Code of Criminal Procedure § 480. And "no sufficient cause appearing," the record continues, Gayes was committed to a New York State Vocational School to be dealt with there according to law. It appears from the facts before us that Gayes did not stay at this correctional institution as long as New York law would have authorized his detention. See New York Penal Law §§ 2184–a and 2189, in connection with § 407. For, on October 14, 1941, he pleaded guilty, in the County Court of Schenectady, New York, to a new charge of burglary in the third degree. The record of this latter proceeding does not indicate whether this time he was or was not represented by counsel. But no claim is made that this plea of guilty, or the sentence under it, has any infirmity for lack of legal assistance. Gayes' claim is that he was sentenced as a second offender by the inclusion of the improper sentence to the vocational school in 1938.

In accordance with New York procedure, Gayes, *pro se*, filed in the County Court of Monroe County, New York, an application to vacate the judgment rendered against him in that court on July 28, 1938. He claimed that in the proceedings which led to that judgment he had not been informed of his "Constitutional Rights of Assistance of Counsel," that he "could not have understood his rights to Counsel" and that "youths of the age of 16 years cannot Intelligently and Competently waive their rights."

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here for review. But the differences that may exist between formal entry in the minutes of an acceptance of a plea and what was actually said contemporaneously lends force to the caution frequently expressed that every intendment must be made in support of the due observance of law in the rendering of judgments which are collaterally attacked, often after a considerable passage of time.

Since, according to this claim, the first sentence was void, he challenged the validity of the sentence in 1941 because the length of the second sentence was partly based upon the 1938 conviction.

Upon this record, the county court denied the motion without opinion. As New York law then stood, no review could there be had of this determination. See *People* v. *Gersewitz*, 294 N. Y. 163. This made the county court the highest court of the State of New York for purposes of our review. *Canizio* v. *New York*, 327 U. S. 82, 85. But see Chapter 706 of the New York Laws of 1947. We brought the case here, 329 U. S. [redacted], as one of a series, for further consideration of the circumstances under which the requirements of due process imply a duty to supply counsel to defendants in State prosecutions.

The guiding principles bearing on the general problem have been set forth in the opinion in No. 540, *Foster and Payne* v. *Illinois*, just decided, *ante* p. —. Insofar as the facts of this case present a particular variant, they are controlled by our decision in *Canizio* v. *New York*, *supra*. We there held that whatever doubts may arise from the circumstances of a plea of guilty, if, before sentence is imposed, the opportunities required by the Constitution for meeting the legal implications of the plea are satisfied, the sentence must stand. And so, the questions that may be raised regarding the circumstances attending the imposition of Gayes' commitment to the vocational institution in 1938 are not now open. Gayes is complaining of his sentence following his plea of guilty in 1941.[2]

[2] Gayes is detained under the 1941 sentence imposed by the County Court of Schenectady. A motion attacking that sentence would, under New York law, have to be made in that court. What he is asking is the invalidation of the prior sentence, underlying as it were the Schenectady sentence, presumably as a first step in getting relief from detention under the latter sentence. We are treating this proceeding, for our purposes, as one seeking, in effect, relief from the 1941 sentence without regard to formal distinctions which might otherwise be relevant.

What he wants is to be relieved of his imprisonment under that sentence. That sentence, to be sure, partly took into account his earlier sentence in 1938. But upon his subsequent sentence, as a second offender, in 1941, he had full opportunity, so far as appears, to contest whatever infirmity he may have claimed in the earlier sentence when the fact of that sentence was included in the sentence which he is now serving.[3] Since the process leading up to the second sentence is not challenged he cannot now, so far as the United States Constitution is concerned, by a flank attack, challenge the sentence of 1938.

Judgment affirmed.

MR. JUSTICE BURTON concurs in the result.

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[3] According to the State, Gayes could have raised the claim he now makes against the 1938 conviction at the time he was sentenced in 1941, and from a denial of relief could have appealed to the higher courts. This was not contradicted by the petitioner and is not brought into question in any opinion of the higher courts of New York. It has been ruled in courts of very limited authority that a second offender cannot apply for resentence on a claim that there was a defect in the first sentence imposed by another court. See *People* v. *Keller*, 37 N. Y. Supp. 2d 61 (Gen. Sess. N. Y. County), and *People* v. *Paterno*, 182 Misc. 491 (Chatauqua County Court). Neither case, however, presented the claim that a violation of the United States Constitution vitiated the first sentence, and neither case raised the power of the court at the time of sentencing to consider such a claim. It is certainly within the power of a duly advised defendant, before pleading guilty as a second offender, to raise the constitutional invalidity of the first sentence so as to secure opportunity appropriately to challenge such invalidity. Nothing that is herein decided precludes petitioner from raising a denial of his constitutional right upon a record that discloses circumstances other than those before us. An order on such a motion is now reviewable by the New York Supreme Court and in certain instances by the New York Court of Appeals.

p. 5.

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1946.

Marvin Gayes, Petitioner, v. The State of New York. | On Writ of Certiorari to the County Court of Monroe County, State of New York.

[June 23, 1947.]

Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy concur, dissenting.

A sixteen-year-old boy, indigent and alone, without relatives, friends, money or counsel to aid him and, according to the undenied allegations of the petition, without knowledge of his constitutional rights,[1] pleaded guilty in 1938, under an indictment specifying two highly technical and distinct charges,[2] to the crime of burglary in the third degree.[3] The property he was charged with intending to steal[4] consisted of cigarettes of the value

[1] No answer was filed to the petition and the trial court determined the issues on the pleadings without hearing or appearance of petitioner in court, in person or by counsel. The allegation of petitioner that when asked whether he "desired counsel," he answered "no" in the belief that he would have to pay the lawyer's fee, and was not informed to the contrary is, of course, to be taken as true in the absence of denial and of contrary evidence which might have been tendered on a hearing.

[2] The first count charged that petitioner "broke and entered the building and garage of Francis Marolow . . . with intent to commit therein the crime of larceny"; the second count charged petit larceny of the property described in the text above.

[3] The sentence was to confinement in the New York State Vocational Institute, which when imposed for an unspecified term under New York Penal Law § 2184-a carried a maximum of ten years, which is the maximum for burglary in the third degree as a first offense. N. Y. Penal Law § 407 (3).

[4] Under the second count, for petit larceny or theft, being also presumably the property with respect to which it was charged in the first count that petitioner broke and entered with intent to commit larceny.

of seventy-five cents, two flashlights worth one dollar, and three dollars in currency. The sentence imposed on that plea has been served.[5] He is now confined as a second offender under sentence for another offense of similar character imposed in 1941,[6] when he was nineteen and also without relatives, friends or counsel so far as appears.[7]

One part of the opinion announced in this case, as I understand, takes the view that because Gayes did not attack the 1938 sentence in 1941, when he was sentenced as a second offender, he is forever foreclosed from doing so on the facts and issues presented on this record, although as a second offender he is now suffering the consequences of the 1938 sentence.[8] For this conclusion reliance is placed upon no New York authorities; indeed, as I read the state cases, the Court's decision is made in

[5] Petitioner was held under the first sentence, see note 3, until December 14, 1943, when the New York Board of Parole directed that service of the sentence as second offender begin. The date of termination of the latter sentence, see note 6, was correspondingly postponed.

[6] The sentence of ten to twenty years as second offender is mandatory. N. Y. Penal Law § 1941. Had petitioner been sentenced in 1941 as a first rather than a second offender, the maximum sentence allowed would have been five to ten years, N. Y. Penal Law §§ 2189, 407, and he might have been sent to a reformatory rather than prison. N. Y. Penal Law § 2185.

[7] The "Record of Conviction" in the trial for the second offense, contained in the record here, discloses that petitioner, having been charged and arraigned, first pleaded not guilty, then withdrew that plea and entered one of guilty. It is then recited that petitioner appeared for judgment and, "having been asked by the clerk whether he had any legal cause to show why judgment should not be pronounced against him, and no legal cause having been shown" or appearing to the court, judgment and sentence were thereupon pronounced. There is no recital that petitioner was represented by counsel, was informed of his rights in any manner, or admonished of the consequences of his plea.

[8] See notes 3, 5, 6 *supra*. See also note 12 *infra* and text.

the face of their rulings that the procedure petitioner has followed is the appropriate one for raising the issues he presents.[9]

I am unwilling to subscribe to such a doctrine of forfeitures concerning constitutional rights, which in the extreme circumstances of this case seems to me shocking.

Under all of the New York decisions which have passed upon the question,[10] the proper and apparently the necessary procedure, see *People* v. *Keller*, —Misc. —, 37 N. Y. S. 2d 61, 62, for attacking a sentence as second offender, upon the ground that the former conviction was invalid, is first by motion in the court imposing the initial sentence to vacate it, after which if the motion is successful the sentence for the second offense may be attacked and vacated.[11] In other words, the second offender, situated as is petitioner, must first overturn his first conviction in the court where it was obtained, before he can attack the second sentence founded in part upon that conviction.

This procedure in my opinion is a reasonable one within the power of a state to require, at least where both offenses

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[9] See note 11 *infra*.

[10] In the absence of determination by a state's highest tribunal the rule announced and applied by other state courts is to be taken by us as determining questions of state law. Cf. *West* v. *A. T. & T. Co.*, 311 U. S. 211.

[11] If the 1938 conviction is held void, under state law petitioner then may move to vacate the 1941 sentence in the court which imposed it, and for resentencing according to state law. See *People ex rel. Sloane* v. *Lawes*, 255 N. Y. 112; *People ex rel. Carolle* v. *Brophy*, 294 N. Y. 540; *People* v. *Keller*, — Misc. —, 37 N. Y. S. 2d 61. And the proper forum for attacking the 1938 conviction, as a preliminary to attack on that of 1941, is the one where the former was obtained, by the motion to vacate which petitioner has employed. *People* v. *Bernoff*, — Misc. —, 61 N. Y. S. 2d 46; *People* v. *Foster*, 182 Misc. 73; *People* v. *Paterno*, 187 Misc. 56, with which compare *People* v. *Paterno*, 182 Misc. 491; cf. *People* v. *Gersewitz*, 294 N. Y. 163, 167; *People* v. *Keller*, *supra*, at 63.

have taken place within its jurisdiction. And I know of no reason why this Court should disregard or override it. Much less is it within our province to invert the state procedure, if that is the effect of the dubious suggestion that petitioner's rights perhaps may be saved upon some other record "that discloses circumstances other than those before us," presumably if at all by motion before the court which imposed the 1941 sentence to vacate it.[12]

No state decisions are cited or, it would seem in view of the contrary authorities cited above,[13] can be cited to support such a view. Nor is it required by anything said or done in *Canizio* v. *New York*, 327 U. S. 82, if indeed such a matter could ever be within our function. The *Canizio* decision has no relevance to this case, either for prescribing the state procedure or for the constitutional issue. It held only that where a defendant had counsel at the time of his sentence and could then have moved to withdraw

[12] The opinion announced in conjunction with the Court's judgment seems to suggest that the decisions establishing the state procedure followed in this case are not controlling for our disposition, on what basis I am unable to understand, see note 10 *supra*, unless upon the untenable one that state rulings upon criminal procedures and the proper forum for utilizing them are not binding for federal determinations to the same extent as are such rulings in civil matters.

Only upon some such basis is the dubious suggestion justified that petitioner should have raised the question of the validity of his first sentence at the time of his sentencing as a second offender and in that forum. Not only is this contrary to the established state procedure, see note 11, but it is expressly qualified by the further suggestion that petitioner's rights may possibly be saved "upon a record that discloses circumstances other than those before us," and it seems to be contradicted by the further statement that "the questions that may be raised regarding the circumstances attending the imposition of Gayes' commitment . . . in 1938 are not now open." It is pertinent to inquired whether Gayes is to have another chance, through a local procedure prescribed by this Court alone, or whether the constitutional questions now presented are foreclosed by his failure to follow a procedure not prescribed or, so far as appears, permitted by the state.

[13] See note 11.

his prior plea of guilty, he was not prejudiced by the convicting court's previous failure to inform him of his right to counsel.

That case had nothing to do with the state procedure open to one convicted as a second offender for challenging his sentence on the ground that the first conviction was invalid for federal constitutional reasons. And the facts, on the merits, were very different from those presented here. Whereas, among other things, in that case the petitioner did have counsel before his sentence was imposed, here not only was Gayes denied counsel altogether in the first trial, but so far as the record discloses he had none in the trial for the second offense. I do not think the *Canizio* decision can be held to cover such a wholly different situation as this. It did not rule that, if a convicted person has never had counsel, the fact that in a later proceeding he conceivable might have had such aid if he had applied for it cures the denial, more particularly when so far as appears he was treated no better during his trial for the second offense than during the first, and when moreover his present attack is made as a preliminary one required by state law for showing the second sentence invalid.

In my judgment it is for the state, not this Court, to say whether the atack upon the first sentence as increasing the second shall be made on the flank or frontally, or perchance in either way. Indeed, under the law of New York, which is controlling on us, the so-called "flank" attack is apparently the only one now open to petitioner. In the face of so clear a violation of constitutional right as this case presents, we should neither foreclose that avenue nor substitute for it another dubiously available one of our own manufacture.

The judgment should be reversed.